No. 11-A_____

In the Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND PROTECT MARRIAGE WASHINGTON,
Appellants

v.

REED et al., *Appellees and Intervenor-Appellees*,

Appeal from No. 11-35854 in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 3:09-CV-05456-BHS in the
U.S. District Court for the Western District of Washington

Application of John Doe #1, John Doe #2, and Protect Marriage Washington for a Writ of Injunction Pending Appeal

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To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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November 18, 2011

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Application of John Doe #1, John Doe #2, and Protect Marriage Washington for Injunction Pending Appeal

To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

Plaintiffs-Appellants John Doe #1, John Doe #2, and Protect Marriage Washington (collectively, "PMW") respectfully move for an order granting a writ of injunction pending final action by the Ninth Circuit and possible review by the U.S. Supreme Court. PMW is seeking a disclosure exemption from Washington's public records act due to "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (internal brackets omitted) (*quoting Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). As is explained below, the district court found that PMW is not entitled to an exemption and, in so doing, lifted the injunction preventing disclosure of Washington Referendum 71 petitions and disclosed the names of the John Does and PMW's witnesses sua sponte, the identity of which had previously been protected and either redacted or kept under seal. Immediate relief is needed to prevent the irreparable harm to PMW's First Amendment rights to free political speech, privacy, and association.

Facts and Procedural History

Applicant Protect Marriage Washington circulated a petition on Senate

Bill 5688, designated Referendum 71 ("R-71"). *Doe v. Reed*, 130 S. Ct. at 2816 While Protect Marriage Washington was collecting signatures, several groups stated that they intended to utilize the Washington Public Records Act ("PRA"), RCW § 42.56.001 et seq., to obtain copies of petitions submitted to the Secretary of State ("Secretary"). *Id.* On July 25, 2009, Protect Marriage Washington submitted over 138,500 signatures to the Secretary of State ("Secretary"). *Id*. Petitioners John Doe #1 and John Doe #2 signed the petition. The Secretary conducted an extensive canvass and verification of the petition signatures, checked every one, and determined that R-71 qualified for the November 3 ballot.

Believing that the public exposure of their identities as R-71 petition signers would unconstitutionally abridge their First Amendment rights, PMW filed a two-count complaint in the Western District of Washington on July 28, 2009, seeking to enjoin the State from publicizing the names and addresses of R-71 petition signers. On the same date, PMW also filed motions for a temporary restraining order and a preliminary injunction.

On July 29, 2009, the district court granted PMW's motion for a temporary restraining order. On September 10, 2009, the district court preliminarily enjoined the State from releasing copies of the R-71 petition. *Doe v. Reed*, 661 F. Supp. 2d 1194, 1205 (W.D. Wash. 2009). Because the court was able to dispose of the case under Count I of the complaint (facial challenge to disclosure of petition

signers), the court did not reach Count II (as applied challenge to disclosure based on harassment risk). *Id*.

On September 14, the State, followed later by Intervenors, appealed to the Ninth Circuit. The State asked the Ninth Circuit to stay the preliminary injunction pending appeal, overturn the preliminary injunction, and expedite in light of the November 3 election. On October 15, the Ninth Circuit issued an Order staying the preliminary injunction, effective immediately.[1] PMW sought a stay from the Circuit Justice for the Ninth Circuit to prevent public release of petition signers' names and contact information. A stay was granted by Justice Kennedy on October 19, 2009 and then by the full Court on October 20, 2009, pending resolution of a timely filed petition for writ of certiorari.

On June 24, 2010, the U.S. Supreme Court rejected PMW's facial challenge and held that the PRA was constitutional as applied to "referendum petitions in general." *Doe v. Reed*, 130 S. Ct. 2811, 2821.

PMW then sought summary judgment in the district court on its claim that the PRA is unconstitutional as applied to R-71 petition signers. The State and two Intervenors filed cross motions for summary judgment. On October 17, 2011, the district court granted summary judgment in favor of the State and

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[1] On October 22, 2009, the Ninth Circuit issued its opinion reversing the district court's judgment, holding that the PRA was likely constitutional as applied to referendum petitions in general. *Doe v. Reed*, 586 F.3d 671, 680–81 (9th Cir. 2009).

Intervenors and denied PMW's motion for summary judgment. Order Denying Plaintiffs' Motion for Summary Judgment at 34 (W.D. Wash. Oct. 17, 2011) (hereinafter "Order") (Appendix ("App.") 34a). In so doing, the district court lifted the injunction preventing disclosure of R-71 petitions and sua sponte disclosed the names of the PMW's John Does and witnesses, the identity of which had previously been protected and either redacted or kept under seal. Immediately after the Order, the State began releasing petitions.

On October 17, 2011, shortly after the district court's Order was released, PMW filed a motion seeking an injunction pending appeal in the district court. On the same day, PMW filed a notice of appeal of the Order. On October 20, 2011, PMW filed the first Emergency Motion for Injunction Pending Appeal before the Ninth Circuit. On October 24, 2011, the Ninth Circuit denied PMW's Motion,without prejudice, pursuant to Fed. R. App. P. 8(a) and stated that the Motion may be renewed after the district court ruled on the pending motion. The Ninth Circuit issued a temporary injunction preventing the State from releasing the petitions that remains in effect until five days after the district court's ruling.

On October 25, 2011, PMW contacted Appellees and Intervenors regarding asking the district court to expedite consideration of its motion. On November 8, 2011, the district court denied PMW's motion. Order Denying Plaintiffs' Motion for Injunction Pending Appeal (W.D. Wash. Nov. 8, 2011) (hereinafter "Injunction Order") (App. 35a). On November 9, 2011, PMW filed a renewed

Emergency Motion for Injunction Pending Appeal before the Ninth Circuit. On November 16, 2011, the Ninth Circuit denied PMW's motion, noting that it "preliminarily believes that the appeal is moot due to the release of R-71 petitions." Order Denying Motion for Injunction Pending Appeal at 2 (9th Cir. Nov. 16, 2011) ("Ninth Circuit Order") (App. 41a). Circuit Judge Smith strongly dissented, stating that, "[b]y not granting the injunction, this court will essentially decide the merits of the case and remove the potential for the appellants to receive *any* of the relief they seek from this court of appeal." Ninth Circuit Order at 5 (Smith, dissenting).

Standards for Granting a Writ of Injunction

Title 28, United States Code, Section 2101(f) provides that "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." For a stay to be granted, the moving party must show "a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994).

The authority of this Court to grant a writ of injunction is found in the All

Writs Act, 28 U.S.C. § 1651(a), which reads:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The grant of a writ of injunction, unlike a stay, "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., Circuit Justice). For this reason, a motion for injunctive relief typically "demands a significantly higher justification than that described in . . . stay cases." *Id.* The most significant difference is that rather than having to make a "strong showing" of likelihood of success on the merits (the standard in stay cases), the Court will not issue a writ of injunction unless the legal rights at issue are "indisputably clear." *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., Circuit Justice) (citation and internal quotation marks omitted). However, while a preliminary injunction may be generally an "extraordinary remedy," it is not "extraordinary" where free speech is at issue, *see, e.g.*, *Ashcroft v. ACLU*, 524 U.S. 656 (2004) (finding no abuse of discretion in granting preliminary injunction against enforcement of Child Online Protection Act). In any event, all the requirements for an injunction are met in this case.

Argument

I. The Applicants Will Suffer Immediate and Irreparable Injury if a Writ of Injunction Is Not Issued.

PMW will be irreparably harmed if the State is not enjoined from releasing the petitions, and if Intervenors are not enjoined from releasing the information it received from the State, pending appeal. Not enjoining the State from releasing the names of the petition signers will forever deprive PMW of their First Amendment rights, which constitutes clear irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Brown v. Cal. Dep't of Transp.*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that irreparable injury may be presumed when a plaintiff states a colorable First Amendment claim); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (same).

The district court stated that PMW "failed to show how they would be irreparably harmed by Defendants releasing further R-71 petitions when copies have already been posted on the internet." Injunction Order at 4 (App. 38a.) However, PMW will be irreparably harmed by the release to even one more requestor and by the Intervenors publicizing the petitions they received from the State. PMW is irreparably harmed by the continued publication of the district court's unredacted Order. Absent an injunction, the State will release the very petitions at issue in PMW's appeal before they have the opportunity to seek review before the Ninth Circuit or via a writ of certiorari.

II. There Is a Reasonable Probability that the Court Will Grant Certiorari.

Under Supreme Court Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The Court will consider cases that, among other things, involve a split amongst Circuits or important questions of federal law that should be decided by the Court. Sup. Ct. R. 10 (a) and (c). Even though the Circuit Court has not yet decided the merits of this case, the fact that the Circuit Court denied PMW's Motion for Injunction Pending Appeal because it believes PMW's claims are probably moot indicates that, once it issues a final decision on the merits, there is a reasonable probably that this Court will grant certiorari.

In discussing Count One of PMW's claim, various Supreme Court Justice speculated on what type of evidence would be necessary for the as-applied challenge. *Doe v. Reed*, 130 S. Ct. 2811. That as-applied challenge is now ripe for review. And, under the standard articulated by the district court, it is unclear whether any organizations will ever be able to obtain a disclosure exemption. As is explained below, PMW did satisfy this Court's standard for an exemption and still was denied relief under a heightened and unattainable standard of proof. As Judge Smith stated in his dissent, "[a]s the Supreme Court did not specifically address the standard for an as-applied challenge to the appellants, there exists a serious question as to what the standard should be and whether the appellants demonstrated sufficient evidence to meet this standard, especially in a situation

where there is likely no minor party status." Ninth Circuit Order at 8 (Smith, dissenting) (App 47a.) As this is a question that affects the associational rights of groups throughout the country, there is a reasonable probability that the Court will grant certiorari.

III. It Is Indisputably Clear that PMW Will Ultimately Prevail on the Merits, Because It Has Shown that There Is a Reasonable Probability of Threats, Harassment, and Reprisals if the Petitions Are Released.

In this case, PMW seek a disclosure exemption from Washington's public records act due to "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. 2811, 2821 (internal brackets omitted) (*quoting Buckley v. Valeo*, 424 U.S. 1, 74 (1976)); *see also Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003). It is clear that PMW will succeed in seeking a disclosure exemption because its claims are not moot and because it has satisfied the necessary evidentiary threshold for an exemption.

A. The Controversy Is Not Moot Because the State Is Actively Releasing the Petitions in Question.

The Circuit Court dismissed PMW's Motion because it "preliminarily believes the appeal is moot due to the release of the R-71 petitions." Ninth Circuit Order at 2 (App. 41a). However, as was pointed out by Judge Smith, the district court found that "some relief could be given" and this issue "remains a live controversy." Injunction Order at 3-4. (App. 37a-38a.) "The district court, which has extensive

familiarity with the record, found that 'some relief could be given by enjoining [appelleees] from disseminating any further R-71 petitions." Ninth Circuit Order at 3 (Smith, dissenting) (42a.)

PMW is asking for an injunction to prevent the State from releasing the R-71 petitions, the Intervenors from distributing the petitions, and the district court from continuing to disclose PMW's John Does and witnesses in the Order pending the appeal of the denial of its motion for summary judgment. As the district court found when reviewing the same facts and circumstances, there remains a live controversy.

"A case does not become moot simply because an appellate court is unable completely to restore the parties to the *status quo ante*. . . . The ability of the appellate court to 'effectuate a partial remedy' is sufficient to prevent mootness. " *SunAmerica Corporation v. Sun Life Assurance Company of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (*quoting Church of Scientology of California v. United States*, 506 U.S. 9, 12-14 (1992)).

Nevertheless, the Circuit Court denied the motion based on the fact that the appeal itself may be moot. The majority's two-paragraph reasoning does not elaborate on why the appeal is moot. As explained by Judge Smith in his dissent, "[w]hile it is now debatable whether this case is moot, the majority's decision will foreclose any further debate on the topic." Ninth Circuit Order at 5 (App. 44a.) Indeed, there is a live controversy as PMW will be harmed by the State responding to the pending requests for the petitions, by the Intervenors distributing of the

petitions, and by the district court's continual disclosure of the John Does and witnesses in the Order. Moreover, even if the release of the petitions to some requesters is enough to deprive PMW of any effective relief, PMW's claims would be justicable as they are capable of repetition yet evading review. *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 461-64 (2007) ("*WRTL-II*").

If PMW prevails in its claim for an exemption from the State of Washington's public records act, it will not be able to recover the harm caused by the State's release of even one more petition, the Intervenors distribution of the petitions, and the district court's continued release of the Order during the pendency of the appeal. Therefore, there is a live controversy and the case is not moot.

B. There is No Threshold "Minor Party" Requirement.

The district court erred by determining that PMW needed to show that it is a minor party or a fringe organization in order to be eligible for the exposure exemption. Order at 11-16 (App. 11a-16a.) In so doing, the district court refers to the "minor party rule in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]." Order at 14 (App. 14a.) However, there is no such minor party requirement. *Buckley* involved claims by "major" and "minor" political parties and the Supreme Court used the phrase "minor party" when referring to those plaintiffs. Fundamentally, there cannot be a "minor party" threshold requirement because the First Amendment does not allow discrimination among speakers. *Citizens United v. FEC*, 130 S.Ct. 876, 899. Also, relevant to the case at hand, the Supreme Court in *Doe v. Reed*, 130 S. Ct. 2811,

recognized that an as applied exemption was possible for PMW without any mention of a "minor party" requirement. *See also* Order at 6-7 (App. 6a-7a.) Rather, what is required is a reasonable probability of "threats, harassment, and reprisals," such as PMW has shown.

C. PMW's Evidence Shows There is a Reasonable Probability of Threats, Harassment, and Reprisals.

The district court erred by determining that PMW's evidence regarding threats, harassment, and reprisals was insufficient. In so doing, the court would have required PMW to prove that the *signers* of the R-71 petition were *themselves* subject to harassment. This is to require an impossibility since, prior to the Order, the petitions had never been released to the public, so that the public did not know who to target for harassment. The Supreme Court has "rejected such 'unduly strict requirements of proof' in favor of 'flexibility in the proof of injury.'" *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 101 n.20 (1982) (*quoting Buckley*, 424 U.S. at 74). There is no requirement that "chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." *Buckley*, 424 U.S. at 74.[2]

The relevant substantive law is clear. The First Amendment requires an exception for groups that show "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or

[2] Along the same lines, the district court erred by considering whether PMW's evidence involved harassment that was criminal in nature and whether the police were able to mitigate any of the harassment.

reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. at 2821 (internal brackets omitted) (*quoting Buckley*, 424 U.S. at 74); *see also Citizens United*, 130 S. Ct. 876, 915 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003).

It is clear that PMW will succeed on their claim that Washington's Public Record Act is unconstitutional as applied to R-71 petition signers because PMW has shown that there is a reasonable probability of threats, harassments, and reprisals. PMW submitted substantial evidence showing that a reasonable person would conclude that if he speaks up about traditional marriage in Washington, he risks facing a reasonable probability of threats, harassment, or reprisals and, therefore, his speech is chilled. Regarding the evidence presented, the district court found that:

> While Plaintiffs have not shown serious and widespread threats, harassment, or reprisals against the signers of R-71, or even that such activity would be reasonably likely to occur upon the publication of their names and contact information, *they have developed substantial evidence that the public advocacy of traditional marriage* as the exclusive definition of marriage, or the expansion of rights for same sex partners, *has engendered hostility in this state, and risen to violence elsewhere*, against some who have engaged in that advocacy.

Order at 33 (App. 33a) (emphasis added).

Yet, the district court denied the exemption. However, the district court did find that the PMW has proven that "public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex partners, has engendered hostility in this state, and risen to violence elsewhere,

against some who have engaged in that advocacy." *Id*. Under the standard articulated by the Supreme Court, PMW should qualify for and should receive the requested exemption.

Moreover, there is now additional evidence that the release of the R-71 petitions will subject the signers to harassment. Immediately following the Order, KnowThyNeighbor.org stated they will "publish the 130,000-plus names in an online searchable database." Austin Jenkins, *Gay Rights Group Says It Will Publish R-71 Petition Signers Names*, NPR.org, Oct. 18, 2011. KnowThyNeighbor's Director Tom Lang says "it allows gay people and their allies to search for individual signers they know and confront them." *Id*. This establishes a reasonable probability of threats, harassment, or reprisals exists as to the signers of the R-71 petition.

D. The District Court Erroneously Publicized the Names of PMW's John Does and Witnesses.

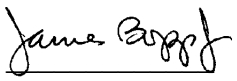
Prior to the issuance of the Order, the identities of the witnesses and John Does were secured by a protective order. The district court granted PMW's renewed request for a protective order on November 15, 2010, noting that "the issue may be revisited closer to the trial date." Minute Entry Granting Motion for a Protective Order, Dkt. 181 (W.D. Wash. Nov. 15, 2010) (App. 49a.) The issue of lifting the protective order was not revisited, not in the parties' summary judgment briefing nor brought up at the summary judgment hearing. Nor was the listing of previously-protected information necessary for the district court's opinion. The district court erred in removing the protective order without giving PMW an

opportunity to be heard on why it should remain in place. This is a clear violation of PMW's due process rights and it will succeed on this claim as well.

Conclusion

PMW respectfully request a writ of injunction pending final action by the Ninth Circuit and possible review by the U.S. Supreme Court.

Respectfully Submitted this 18th day of November, 2011,



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Application of John Doe #1, John Doe #2, and Protect Marriage Washington for a Writ of Injunction Pending Appeal - Certificate of Service

To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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November 18, 2011

I, James Bopp, Jr., a member of the bar of this court, certify that on November 18, 2011, I served a copy of the *Application of John Doe #1, John Doe #2, and Protect Marriage Washington for Writ of Injunction Pending Appeal*, along with the *Appendix*, with the following individuals at the addresses listed below by placing a copy for delivery by Federal Express, and served a courtesy copy of the same via email upon the following persons:

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November 18, 2011

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